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INCONSISTENCIES UNDER THE "OWNERSHIP IN PLACE" THEORY OF OIL AND GAS

By W. LEWIS ROBERTS*

The very great confusion that exists in the decisions regarding the nature of one's rights to oil and gas in place, is apparently due in large measure to the fact that the instrument used in creating or transferring those rights has been called a lease and also to the fact that judges and lawyers generally have not been as familiar with the theory and nature of profits a prendre as they should have been.

Let us consider the nature of a profit a prendre and also the characteristics of leases by which oil and gas rights are created and transferred. A profit a prendre is the right to take "a part of the soil or the products of the soil from the land of another person."¹ This includes the right to take timber, turf, coal and minerals. "An easement," say Minor and Wurts, "differs from a profit a prendre in that a profit a prendre always supposes the right to take some corporeal profit from the lands of another, while an easement merely confers a right to use another's land, or to compel the latter to abstain from using it in a particular way, without taking any corporeal profit therefrom."² A profit a prendre, as in the case of an easement, is acquired by express grant. It may be, also like an easement, acquired by prescription.³

Tiffany says that "a profit a prendre involves primarily a power to acquire, by severance or removal from another's

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¹ Minor & Wurts, *Real Property*, sec. 66.

² *Ibid.*, sec. 89.

³ Tiffany, *Real Property* (2nd ed.), Vol. II, p. 1397.

land, some thing or things previously constituting a part of the land, or appertaining thereto, the holder of the profit a prendre having, as an integral part thereof, rights against the members of the community generally. . . .” He then proceeds further to remind his readers that they must carefully distinguish between a profit a prendre in minerals and an estate in the minerals themselves. “A right to take oil and gas,” he adds, “from land in which the person so entitled has no right of ownership is likewise, though not always expressly so stated, a right of profit a prendre.”⁴ This right, this profit a prendre, to take part of the substance of the soil of another, may be an exclusive right or it may be shared with others as in the case of right in common.⁵ It may be for the benefit of a particular piece of land, that is appurtenant to land, or it may be in gross, that is for the benefit of the owner thereof without regard to the ownership of any other holding.⁶ The owner’s interest in a profit a prendre may be for a definite term of years, for life or for an indefinite duration, just as in the case of an easement or the land itself. In other words, one may have a term for years, a life estate, a fee simple or a determinable fee in a profit a prendre.⁷ Then, too, an owner in conveying his land may make a “reservation” or “exception” of a profit, just as he can in the case of an easement.⁸ The ownership of a profit a prendre carries with it the right to make such use of the surface as is reasonably necessary to its enjoyment, and he may bring an action of *quare clausum fregit* against one interfering with his right.⁹

Turning to the leases used to convey or create interests in the oil and gas under an owner’s land, we find that various forms have been and are being used. One writer has pointed out that there are three types or three different interpretations put upon leases: the first considers that an incorporeal hereditament, a profit a prendre, is created; sometimes called a mining license; the second treats the conveyance as a lease of the land itself for mining purposes; and the third deals with the transaction as a conveyance of the title to the oil and

⁴ *Ibid.*, pp. 1396, 1397.

⁵ Minor & Wurts, *op. cit.*, sec. 66.

⁶ *Ibid.*, sec. 67.

⁷ Tiffany, *op. cit.*, p. 1389.

⁸ *Ibid.*, p. 1398.

⁹ *Ibid.*, p. 1389.

gas, making a severance of those substances from the surface, creating separate estates; the latter view being possible only where it is deemed that oil and gas are subject to ownership in place as is the case in Texas.¹⁰ It has been pointed out that in many of the earlier decisions in Louisiana involving the construction of so-called oil and gas leases, the contracts were held to be leases and not conveyances. This is in contrast with the more recent decisions where they are held to be grants of servitudes.¹¹ The late Professor Simonton has pointed out very clearly the difference between a common law lease and a grant of an interest in oil and gas. He said:

"It is held that no new kind of estate in real property can be created and it follows that the interest of the lessee, as heretofore stated, must be a license, a profit or a leasehold. It has already been shown that the estate is not a license though it is often erroneously so termed. A leasehold at common law contemplates a corporeal interest in the land of which the lessee has the use and occupation and for which he pays a compensation called rent. The lessee has no right to destroy the substance of the soil unless such right be expressly conferred, but has only the right to use the premises leased. If he takes part of the soil itself he is guilty of waste. It seems clear, therefore, that the estate in land which the grantee acquires under an oil and gas lease is not a leasehold estate and that the relation of landlord and tenant does not arise between the parties. The sole object of the oil and gas lease is to search for and produce oil and gas, a thing which no tenant would have a right to do without special permission granted in his lease. The grantee under an oil and gas lease has no right in the surface of the land except those necessary to enable him to carry out advantageously the one object of the grant."¹²

This writer then concludes that the interest created by such an instrument is a profit a prendre and points out that different estates may be created in such interests, terms for years, life estates and fees simple. A so-called lease to last so long as oil and gas are produced in paying quantities, it has been suggested by Professor Simonton, cannot be deemed a term for years. If it is of such uncertain duration, it apparently is a fee. Furthermore, he points out that the real object of an oil and gas lease is to develop the land in order to secure the minerals, title to the same passing to the grantee when he reduces them to possession, a characteristic of a profit a prendre.¹³

¹⁰ Walker, *Property Interests Created by an Oil and Gas Lease in Texas*, 7 Texas L. Rev. 1, at p. 562 (1929).

¹¹ Kepper, Jr., *The Judicial Nature of Oil and Gas Rights in Louisiana*, 9 Tulane L. Rev. 275 (1935).

¹² 25 W. Va. L. Rev. 295, at 320 (1918).

¹³ *Ibid.*, p. 322.

Several courts, where the question has arisen in regard to the nature of the rights acquired under oil and gas leases, have recognized that an incorporeal interest is created. At an early date the Kansas court said: "An oil and gas lease conveys no present vested interest in the oil and gas in place. The interest conveyed is a mere license to explore—an incorporeal hereditament—a profit a prendre."¹⁴ And the Indiana court early took a similar view.¹⁵

The Oklahoma court is in accord. As early as 1918, in speaking of the interest created under an oil and gas lease, it said:

"This right to explore for and reduce to possession oil and gas is the proper subject of sale, and may be granted or reserved. . . . The right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament or more specifically, as designated in the ancient French, a profit a prendre, analogous to a profit to hunt and fish on the land of another. . . . Considered with respect to duration, if the grant be to one and his heirs and assigns forever, it is of an interest in fee. . . . An interest of less duration may be granted, and that for a term of years has been denominated by this court a chattel real. . . . Such a right is an interest in land."¹⁶

Several recent decisions in California have very clearly set out the theory of the non-ownership of oil and gas in place. In *Callaghan v. Martin*,¹⁷ the court recognized the fact that the lessor in an oil and gas lease gives his lessee a right to drill for and produce oil and gas. It said: "these rights of the lessee present a clear case of a profit a prendre in gross, a right to remove a part of the substance of the land. If the oil and gas lessee is not granted exclusive possession of the surface by the terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which in fact, may preclude any other surface possession." The court denied that this right of the lessee was a mere license to enter and explore for oil and gas. It laid down the proposition that in California "the interest of the lessee is an estate for years and a present interest and estate in land."

¹⁴ *Phillips v. Oil Co.*, 76 Kan. 783, 92 Pac. 1119 (1907), the court said: "An oil and gas lease conveys no present vested interest in the oil and gas in place. The interest conveyed is a mere license to explore—an incorporeal hereditament—a profit a prendre."

¹⁵ Law same in Indiana; *Townsend v. State*, 149 Ind. 624, 47 N.E. 19, 37 L.R.A. 294, 62 Am. St. R. 477 (1897).

¹⁶ *Rich v. Doneghy*, 71 Okla. 204, 177 Pac. 86, 3 A.L.R. 352 (1918).

¹⁷ 3 Cal. (2d) 110, 43 Pac. (2d) 788 (1935).

The court held in this case that a transfer of an interest in the oil royalties, not limited to oil to be produced under a particular lease, created an interest in perpetuity. The holders of these royalties have rights of profit a prendre, the court said, which are estates in real property. The case of *Dabney v. Edwards*,¹⁸ decided the same year as *Callaghan v. Martin*, was also concerned with the classification of oil leases as personalty or realty for the purpose of determining whether the agreement authorizing a real estate broker to sell was within the Statute of Frauds. It was pointed out that the California courts had uniformly held that an oil and gas lease created a term for years and was personalty. The court held, however, that where the interest created was for a term of indefinite and uncertain duration, which under the common law was classified as a freehold estate in the nature of a qualified or determinable fee, it must be classed as real property. The clause in a lease that it shall continue "as long as oil or gas may be found in paying quantities" gives it such indefinite duration as makes the interest freehold in quantity, the court said.

*Dabney-Johnston Oil Corporation v. Walden*¹⁹ arose over the right of one tenant in common to produce oil without first obtaining the approval of his cotenants. It was held that his doing so was not waste. However, it was held he must account to his cotenants for their proportionate shares. In the course of its opinion, the court observed:

"The owner of land has the exclusive right on his land to drill for and produce oil. This right inhering in the owner by virtue of his title to the land is a valuable right which he may transfer. The right when granted is a profit a prendre, a right to remove a part of the substance of the land. A profit a prendre is an interest in real property in the nature of an incorporated hereditament."

Standard Oil Company of California v. John P. Mills Organization,²⁰ decided the same day as *Callaghan v. Martin*, dealt with the rights of assignees of oil royalties. The decision was that the assignees of a landowner's interest in his oil rights created an interest or estate in real property which might be enforced against a grantee of the fee of the land itself. The court regarded the oil royalty as rent and denied the application of the principle of apportionment where the land covered by

¹⁸ 5 Cal. (2d) 1, 53 Pac. (2d) 962 (1935).

¹⁹ 4 Cal. (2d) 637, 52 Pac. (2d) 237 (1935).

²⁰ 3 Cal. (2d) 128, 43 Pac. (2d) 797 (1935).

the assignment of the royalty was thereafter subdivided. "The oil brought to the surface upon one of the several parcels into which the property has been subdivided," the court said, "may in fact be drawn from beneath the surface of the other parcels."

The California court in 1938 cited *Callaghan v. Martin* with approval for the proposition that an oil and gas lease creates a profit a prendre, vesting in the lessee an incorporeal hereditament, which is a chattel real if it is to endure for years; and *Dabney v. Edwards* for the proposition that if the lease is to run for a "fixed time and so long thereafter as gas or oil or either of said substances is produced therefrom in quantities to pay to pump. . . ." a freehold estate is created in the nature of a determinable fee.²¹

In contrast to the view that the transferee under an oil and gas lease acquires an incorporeal interest, properly termed a profit a prendre, is the ownership in place theory as to the right created in such an instrument. The Texas court has been the most outstanding advocate of this view. In *Stephens County v. Mid-Kansas Oil & Gas Co.*²² it made the following observation regarding the problem:

"We do not regard it as an open question in this state that gas and oil in place are minerals and realty, subject to ownership, severance, and sale, while embedded in the sands or rocks beneath the earth's surface, in like manner and to the same extent as is coal or any solid mineral.

"The objection lacks substantial foundation that gas or oil in a certain tract of land cannot be owned in place, because subject to appropriation, without the consent of the owner of the tract, through drainage from wells on adjacent lands. If the owners of adjacent lands have the right to appropriate, without liability, the gas and oil underlying their neighbor's land, then their neighbor has the correlative right to appropriate, through like methods of drainage, the gas and oil underlying the tracts adjacent to his own." (Citing cases.) "Ultimate injury from the net results of drainage, where proper diligence is used, is altogether too conjectural to form the basis for the denial of a right of property in that which is not only plainly as much realty as any other part of the earth's contents, but realty of the highest value to mankind and often worth far more than anything else on or beneath the surface within the proprietor's boundaries.

"The question whether gas and oil in place were capable of separate ownership and sale was carefully considered and finally determined by this court in *Texas Co. v. Daugherty*, 107 Tex. 234 to 240, 176 S.W. 717, L.R.A. 1917F, 989. The opinion in that case leaves no room for reasonable doubt as to the soundness of the conclusion that gas and oil in place are objects of distinct ownership and sale as a part of the

²¹ *Scheel v. Harr*, 80 Pac. (2d) 1035 (Cal. App. 1938).

²² 113 Tex. 160, 254 S.W. 290 (1923).

land. Moreover, we regard that view as in harmony with the overwhelming weight of the authorities. The law of Oil & Gas, vol. 18, Michigan Law Review, p. 459."

The court has here stated the objection most often raised against the doctrine of ownership in place; namely, that oil and gas are of a fugacious nature and we have the anomalous situation of property rights being transferred by the subject-matter of ownership passing from one man's land to that of another. The court has attempted to meet this objection by the observation that the loser may make good his loss by drawing oil and gas from under his neighbor's land. A writer in the Texas Law Review²³ has very forcibly stated this objection to ownership in place when he says:

"The true and absolute test of the ownership of a thing in all sound legal principles, must be *whether the party claiming such ownership has such right or title to the thing that no one can lawfully take it from him, without his consent*. If this rule is made the test, then unquestionably a land owner has no ownership of the oil and gas underlying his land. It is demonstrable, as above shown, that the land owner loses all semblance of the title to oil and gas which were under his land if they come to the surface through a well drilled by his neighbor on his land. He can not enjoin or stop the drilling of such well, no matter how evident it is that some part of the production of that well is from oil and gas underlying his land, nor can he sustain any claim for damages for such act."

Of course, one might say in answer to this contention that since the law allowed the adjoining owner to draw the oil and gas from under his land, there is not an unlawful taking.

In speaking of the theory of a qualified ownership in oil and gas, Professor Simonton wrote several years ago: "The idea of a qualified ownership of the oil and gas in place as suggested in the above case (*Westmoreland Natural Gas Company v. De Witt*)²⁴ is not only illogical but is inconsistent with the principles of the law of real property. It leads to the absurdity of holding that a man has title to valuable property which the courts will not protect. As was said by Mr. Justice White in *Ohio Oil Company v. Indiana*:²⁵

"But it cannot be that property to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property."²⁶

²³ Greer, *Ownership of Oil and Gas in Place*, 1 Tex. L. Rev. 162, at 169.

²⁴ 130 Pa. St. 235, 18 Atl. 724 (1889).

²⁵ 177 U.S. 190 (1899).

²⁶ *Supra*, n. 12, p. 297.

Thornton, in his fourth edition on Oil and Gas, observes that the loss of ownership in oil and gas where it flows onto the land of another is no more strange than the loss of soil under the doctrine of accretion;²⁷ but the answer to this argument seems to be that the latter doctrine is an anomaly in our property law, on the true basis of which our judges have never been able to agree.

Mr. Justice Seawell of the Supreme Court of California seems to think it does not make a great deal of difference whether you call the interest created under an oil and gas lease a conveyance of the oil and gas in place or the creation of a profit a prendre. In *Dabney-Johnston Oil Corporation v. Walden*,²⁸ he says:

"Although the use of different terms of description may give rise to different legal incidents, as to many particulars the legal consequences are the same, whichever theory is adopted in a particular jurisdiction. . . .

"Where it is apparent from the instrument as a whole that a deed of the mineral fee is intended, which in this state is a right of profit a prendre, it is not essential that it contain express provision for a right of entry to drill for and produce oil. One who grants a thing is presumed to grant also whatever is essential to its use. The right of entry is incident to the grant of the mineral fee, and exists without express mention in like manner as certain rights follow without express enumeration from an ordinary deed absolute of real property."

Now if two views as diametrically different in their nature at the start as the ownership-in-place theory of oil and gas and the theory that the right is a profit a prendre, can reach practically the same legal consequences, it seems pretty certain that one or the other must be based upon a wrong hypothesis. In view of this discrepancy between cause and effect, it seems worthwhile to examine the decisions relative to abandonment, ejectment, mechanics' liens, partition, taxation, reversions and ademption under a will, as they arise under oil and gas leases; and see whether the Texas court, which has always been the outstanding champion of the ownership-in-place theory, or the California court, which is a representative of the profit a prendre theory, is the more logical in its application of the doctrine it advocates.

²⁷ P. 95.

²⁸ *Supra*, n. 19.

ABANDONMENT

It is a well established rule of the common law that one cannot free himself from the title to real property by abandonment thereof. It seems to be equally as well established that he can abandon his rights under an oil and gas lease. The Pennsylvania court gave recognition to this view in an early oil and gas decision involving the right of abandonment. In *Venture Oil Co. v. Fretts*²⁹ it made this statement:

"A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil and gas lease stands on quite different ground. The title is *inchoate* and for purposes of exploration only, until oil is found. If it is not found no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found the right to produce it becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

In commenting upon his passage, Professor Summers says:

"Easements may be abandoned upon the showing of an intent to do so. Nonuser may be evidence of such intent, but the nonuser need not be for the statutory period. Estates, however, legal interests in the ownership class cannot be lost by an intent to abandon, established by nonuser or otherwise. The transfer must satisfy the statute of frauds, or else there must be an adverse holding for the statutory period. The intent of the owner has nothing to do with loss of title by adverse possession. But the court, in *Venture Oil Co. v. Fretts*, says an 'oil lease stands on quite different ground.' That ground could be and actually is in later cases, the policy of development, which requires a lessee to develop and produce or relinquish his interest. But the different ground stated by the court is that until discovery the lessee's interest is *inchoate* or *executory*, and from this draws the conclusion that it can be abandoned. After discovery the court says the interest is vested."³⁰

From these statements it seems clear that vested estates in realty cannot be abandoned but that easements can be,³¹ and as profits a prendre are closely analogous to easements, as pointed out by Minor and Wurts,³² it seems evident that they, too, may be abandoned.³³ The holdings of the courts, which seem unanimous on the point, are to the effect that the lessee may abandon his rights under an oil and gas lease and this conclusion seems consistent with the theory that the right

²⁹ 152 Pa. St. 451, 25 Atl. 732 (1893).

³⁰ Oil & Gas (1927 ed.) p. 209

³¹ Tiffany, *op. cit.*, n. 3, section 277, p. 1377.

³² *Op. cit.*, n. 1, section 66.

³³ Walker, *Interests Created in an Oil and Gas Lease*, 8 Tex. L. Rev. 483, 505.

created by such a lease is a *profit a prendre*.³⁴ On the other hand, it seems difficult to see how a court like that of Texas can consistently hold that the lessee becomes the owner of the oil and gas in place, for years, life or in fee simple, and at the same time hold that he may abandon that ownership. That court has, however, found a rather unique way of getting around the difficulty, at least where the lease can be held to convey a determinable fee. It holds that the cessation of the use of the land for the purpose of exploration, development, and production of oil and gas puts an end to the determinable fee created by the lease, where the lessee is to hold so long as he produces oil and gas in paying quantities. Abandonment, therefore, terminates his estate.³⁵

POSSESSORY ACTIONS—EJECTMENT

To maintain the possessory actions, trespass *quare clausum fregit* and ejectment, one must have title or hold under one having title, or have had prior possession. In the case of a lease, the lessee, under the common law, had only an *interesse termini* before entry and could not maintain either trespass or ejectment. His interest was more contractual than a property right. After entry, he could sue anyone who interfered with his possession under either form of action. The holder of an incorporeal right could maintain neither trespass nor ejectment against a person who interfered with his interest.³⁶ So with oil and gas leases, the lessee generally is not allowed these possessory remedies before entry.³⁷

The only legal remedy allowed the holder of an easement on the land of another, was an action on the case. However, in the case of a *profit a prendre*, if it is exclusive and the owner of such right has entered on the land and proceeded to drill in the case of an oil and gas right, courts today generally hold that he has sufficient possession to allow him either trespass or

³⁴ *American Wholesale Corporation v. F. & S. Oil & Gas Company*, 242 Ky. 356, 46 S.W. (2d) 498 (1932); *Justice v. Burgess*, 244 Ky. 774, 52 S.W. (2d) 720 (1932); *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W. (2d) 1021 (1934); *Kellogg v. Smith*, 171 Okla. 355, 42 Pac. (2d) 489 (1935).

³⁵ *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 19 S.W. (2d) 27 (1928).

³⁶ *Mills v. Willingham, Oil and Gas* (1926 ed.) p. 89; *Kelly v. Keys*, 213 Pa. 295, 62 Atl. 911 (1906).

³⁷ *Tiffany, op. cit.*, n. 3, pp. 114-117; *Kolachny v. Galbreath*, 26 Okla. 772, 110 Pac. 902 (1910).

ejectment. He has the right to use the surface needed and such right, when once exercised, will support the possessory actions.³⁸

The Texas court, where ejectment is supplanted by a statutory remedy to try title in the nature of an action of trespass, allows the lessee to maintain such action whether he has entered under his lease or not. This is at least consistent with the Texas view that the lessee secures the ownership of oil and gas in place,³⁹ however, the remedy is a statutory one and not the common law remedy of ejectment.

PARTITION

The question to what extent cotenants of oil and gas rights in land can compel partition of such interests presents a rather searching test of whether there can really be ownership of oil and gas in place. Of course, in those states where the lessee's rights under an oil and gas lease are regarded as personalty, and therefore not within the statutes relating to the partition of realty, the cotenants' only relief is under the inherent power of equity.⁴⁰ As pointed out by Professor Summers in considering whether compulsory partition will be given in kind depends largely upon the nature of the interests the cotenants have in the oil and gas lands. If they own the surface and there has been no development thereon for oil and gas or either, there seems to be no valid objection to granting a partition in kind. Assuming in such case the question of whether there is oil and gas under the surface is not determined, the case would be like any other case of joint ownership of a plot of land and no reason why the case should not be treated in the usual way, division made on an acreage basis. Where it is known that oil and gas are present but no developments have been made, the same author points out that a majority of the jurisdictions that have considered the question, follow the common law rule as to mineral lands and refuse to grant partition in kind of legal interests in the oil and gas,⁴¹ the general rule in the case of such lands being that partition in kind will not be made. The reason given for such

³⁸ *Ewert v. Robinson*, 289 Fed. 740, 35 A.L.R. 219 (Okla., 1923); *Mills & Willingham, supra*, n. 36, p. 89.

³⁹ *Walker, supra*, n. 10, pp. 565-567.

⁴⁰ *Beardsley v. Kansas Natural Gas Co.*, 78 Kan. 571, 96 Pac. 859 (1908). See also *Mills & Willingham, op. cit.*, n. 36, p. 271.

⁴¹ *Oil and Gas* (Permanent ed., 1938), Vol. 3, p. 235.

refusal is that the minerals may be so unevenly distributed beneath the surface that a division of the surface might result in an unfair division. The Court of Appeals of Kentucky has very well stated the problem. In denying a compulsory division of the land surface in the case of *Union Gas & Oil Co. v. Wieleman Oil Co.*,⁴² the court observed:

"This is a difficult question. True, oil and gas leases are interests in real estate and assignments of such are controlled by the laws regulating the sale of real estate. But even though a part of the realty they are different from the solid minerals in that there is no way to ascertain their location, extent or value. They are fugitives hidden from observation and their very existence may not be determined except by actual drilling. While this land is undeveloped and the parties stand at arm's length, it must be borne in mind that each of the cotenants has a valid lease to an individual moiety of the whole tract. Oil may underlie all or any part or none of it, and a compulsory partition of such mineral rights by laying off sections on the surface is but an exchange of properties 'sight unseen' and, however fairly conducted, bears more resemblance to a speculative enterprise than it does to an equitable division."

The court did, in the particular case, grant a decree for the sale of the property and a division of the proceeds.

Cotenants of oil and gas leases are in a different position. The West Virginia court was one of the first to consider the problem and it decided that a partition of oil and gas by co-owners separate from the surface could not be had and that a judicial partition by assignment of such interest was void.⁴³ The Illinois court accepted this view a few years later, admitting, however, that the lessors who owned the surface could have a partition. To quote the court's own words in the case of *Waterford Oil & Gas Co. v. Shipment*,⁴⁴ "Appellant had no right to a compulsory partition either of the oil or gas, considered separately from the land, or of the land itself." In the particular case, one of three cotenants of the surface had given an oil and gas lease to the appellant. His interest here was of less dignity than those of the other parties to the suit.

The Kentucky court has recently made the following statement in regard to compulsory partition among lessees:

"An oil and gas lease is regarded as the conveyance of an interest in real property until those commodities shall be severed. But the

⁴² 211 Ky. 261, at 383, 277 S.W. 323 (1924).

⁴³ *Vernon v. Hall*, 47 W. Va. 295, 34 S.E. 764 (1899).

⁴⁴ 233 Ill. 9, 84 N.E. 53 (1908); also *Zeigler v. Brenneman*, 237 Ill. 15, 86 N.E. 597 (1908).

nature of the property, as well as the nature of the title, sets it apart from the classification of real estate generally. It cannot be treated in the same manner under all conditions, such, for example, as protecting or enforcing the rights of the owners in the same way. . . . The extent and value of each individual part cannot be ascertained as in the case of surface property. Hence the usual statutes providing for partition of real estate can have no application to the partition of oil and gas interests. There are insuperable difficulties."⁴⁶

On principle the view that lessees of oil and gas interests are not entitled to partition in kind, seems sound. It is in keeping with the view that the interest created by an oil and gas lease is a profit a prendre. Such an interest is not subject to partition under our statutes.⁴⁶ This prohibition, however, does not prevent the parties from getting appropriate relief under the general powers of equity.

Now, in Texas, if the court is consistent, we have a right to expect that lessees of oil and gas interests can have partition under the statute granting such right. This should follow from the position taken by that court that the lessee of an oil and gas lease may secure a defeasible fee in the oil and gas in place. The absence of holdings allowing partition prior to the amendment of the Texas statute in 1917, suggests the conclusion that the Texas court did not regard such partition as allowable. In that year the Texas statutory provision for partition was amended by adding petroleum or gas lands to the list of estates that may be partitioned by court procedure.⁴⁷ Since this change we find comparatively few cases where partition in kind has been granted.⁴⁸ In two of these cases, as pointed out by Professor Summers,⁴⁹ there had been no development for oil and gas and it was not certain that these minerals were present. This fact brings these cases within the general rule that partition will be

⁴⁶ *Warfield Natural Gas Co. v. Cassady*, 266 Ky. 217, 218, 98 S.W. (2d) 495 (1936).

⁴⁷ 1 *Tiffany* (2d ed.) p. 716.

⁴⁸ *Vernon's Texas Statutes* (1936), Article 6082, reads as follows:

"Any joint owner or claimant of any real estate or any interest therein or of any mineral, coal, petroleum, or gas lands, whether held in fee or by lease or otherwise, may compel a partition thereof between the other joint owners or claimants thereof in the manner provided in this chapter. (Act of 1917, p. 295.)"

⁴⁹ *Texas Co. v. Meador*, 243 S.W. 991 (Tex. Civ. App. 1922); *Henderson v. Chesley*, 273 S.W. 299 (Tex. Civ. App. 1925); *Woods v. Rolls*, 268 S.W. 988 (Tex. Civ. App. 1925); *Tide Water Oil Co. v. Bean*, 118 S.W. (2d) 358 (Tex. Civ. App. 1938).

⁵⁰ *Op. cit.*, n. 41, Vol. 3, p. 237.

granted under such circumstances.⁵⁰ The decision in some cases has turned upon the question of whether the action was brought in the right county and no discussion was given the problem of whether partition should be granted.⁵¹ Under some circumstances, the court has refused to grant compulsory partition and has granted a partition of the proceeds derived from a sale of the interests involved.⁵² Provision is made for such a disposition under the statute.⁵³ In several cases the court refused the relief asked because the parties did not hold estates of the same dignity, as where a lessee asked for partition against his lessor and his cotenant;⁵⁴ or where one who purchased an oil lease in part of a tract of land and asked for a partition of the whole tract,⁵⁵ although in *Henderson v. Chesley*⁵⁶ the court said the statute does not require estates to be of equal dignity and in *Tide Water Oil Co. v. Bean*⁵⁷ the court so ruled. These cases decided by the Texas court do not make out a strong case for partition in kind of interests in oil and gas, even with the aid of the statute. They seem to show that as a practical matter such interests are not very generally treated like other interests in land although the court says they are estates comparable to estates in the land itself, estates in fee simple, life estates and leaseholds.

TAXATION

When we come to the methods of taxing the lessee's interest under an oil and gas lease, we find the problem covered by

⁵⁰ *Supra*, n. 41.

⁵¹ *Gee v. Lyles*, 233 S.W. 640 (Tex. Civ. App. 1921); *Caldwell v. Farrier*, 248 S.W. 425 (Tex. Civ. App. 1923); *McKee v. McKee*, 12 S.W. (2d) 849 (Tex. Civ. App. 1928).

⁵² *United North & South Oil Co. v. Meredith*, 272 S.W. 124 (Tex. Comm. App. 1925); *Consolidated Petroleum Co. v. Austin*, 283 S.W. 879 (Tex. Civ. App. 1926).

⁵³ Article 6096, Vernon's Texas Statutes (1936), which reads:

"Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, can not be made it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or be made as under execution, or by private sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled, according to their respective interests." (Acts 1905, p. 95).

⁵⁴ *Medina Oil Development Co. v. Murphy*, 233 S.W. 333 (Tex. Civ. App. 1921).

⁵⁵ *Luckel v. Barnsdall Oil Co.*, 74 S.W. (2d) 127 (Tex. Civ. App. 1934).

⁵⁶ *Supra*, n. 49.

⁵⁷ *Ibid.*

statutory enactments in all jurisdictions.⁵⁸ As has been pointed out by the United States Supreme Court, "Whether realty or personalty is a question of local law upon which the local decisions and statutes control."⁵⁹ The statutes taxing the lessee's interest generally refer to his holding as an interest in land and tax it as such.⁶⁰ Some statutes in defining real property for purposes of taxation provide, as in the case of the Texas statute, that "all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same" shall be taxed as real property.⁶¹ The Texas court has held under this statute that the lessee's rights under an oil and gas lease, without regard to the form of the lease, was taxable as real property.⁶² The Oklahoma statute defining real property, like the Texas statute, refers to "all mines, minerals and quarries" as realty.⁶³ The court in that state, nevertheless, does not tax the lessee's interest under an oil and gas lease as real property.⁶⁴ To do so, the court observes, would impose "a tax upon the illimitable vista of hope."

What a legislature calls a right or interest in a taxing statute is far from being conclusive as to what that right or interest really is. If a taxing statute recites that all white horses shall be taxed as black horses, it can hardly be declared unconstitutional on that account provided it has not violated the rules as to classification in other respects. For that reason the Texas decisions upholding taxes on the lessee's interest under an oil and gas lease are of little value in sustaining the soundness of that courts contention that the lessee under such a lease acquires the ownership of the oil and gas in place rather than a profit a prendre, as maintained by the California and Kansas courts. Besides we have seen that a profit a prendre is an interest in real property.

⁵⁸ Summers, *op. cit.*, n. 41, Chap. 26.

⁵⁹ W. T. Waggoner Estate v. Wichita County, 273 U.S. 113, 47 Sup. Ct. 271 (1927).

⁶⁰ *Supra*, n. 59.

⁶¹ Vernon's Texas Statutes, Article 7146.

⁶² Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290 (1923).

⁶³ 68 Okla. St. Ann. sec. 29, S. L. 1909, chap. 38, p. 574, art. 1, sec. 3.

⁶⁴ Re Indian Territory Illuminating Oil Company, 43 Okla. 307, 142 Pac. 997 (1914).

REVERSION

What happens when a lessor transfers his land on which he has given an oil and gas lease and there is a forfeiture under the terms of the lease or the lessee abandons his rights thereunder? Does this forfeiture or abandonment inure to the benefit of the lessor or to his assignee of the reversion—his grantee of the land? The learned authors of one of the leading treatises on the subject of oil and gas answer these questions in a sweeping generality: "The lessors interest under the lease is ordinarily a part of the reversion. A sale of the land subject to, or without mention of, the mineral lease will carry with it the rights of the lessor to unaccrued royalty, delay rentals and bonus. The same is true of a transfer by operation of law."⁶⁵

The Texas court has expressed this even more forcefully in the case of *Bibb v. Nolan*⁶⁶ where it says:

"When the owner of real estate conveys by warranty deed all of his interest therein without reservation, he conveys, not only his surface rights, but all of the interest which he may own in or to the minerals or the mineral estate . . . the purchaser thereof takes the same subject to the terms of said oil and gas lease contract; and if the oil lease is thereafterwards forfeited, the mineral estate reverts, and becomes the property of the owner of the surface rights at the time same is forfeited."

Courts generally seem to reach this result, the owner of the land subject to an oil and gas lease will hold the same free and clear of the lease upon an enforcement of the forfeiture and these rights to the oil and gas upon forfeiture will not reinvest in the lessor who has transferred his interest in the land itself. It is submitted that this is the proper result to be reached under the theory that an oil and gas lease creates a profit a prendre. As in the case of a right of way or other easement, the assignee or transferee of the servient tenement holds the land free from the encumbrance when such easement is abandoned or otherwise ceases to be. There is nothing to go back to the lessor when the lease is forfeited or abandoned.

Now the Texas court seeks to justify its reaching the same result under its theory that oil and gas are susceptible of ownership in places and can be served from the surface ownership and conveyed as separate estates. Such severance, the court

⁶⁵ Mills & Willingham, *op. cit. supra*, n. 36, p. 202.

⁶⁶ 6 S.W. (2d) 156 (Tex. Civ. App. 1928); *Walker v. Ames*, 229 S.W. 365 (Tex. Civ. App. 1921).

says, creates a determinable fee in the lessee and leaves a possibility of reverter in the lessor. This possibility of reverter, it is held, is assignable. Under the common law conception of a possibility of reverter, such an interest could not be assigned as it was a mere possibility.⁶⁷ The court recognized this fact in its opinion in the case of *Caruthers v. Leonard*⁶⁸ where, in speaking of the lessee's estate, it is said:

"It is not an estate upon condition subsequent, because the estate determines ipso facto upon the happening of any of the events—any one of the failures by the lessee or his assigns to act—by which its limitation is measured, and its termination does not depend upon the taking of any action by anyone to determine it. . . .

"All that remained to him (the lessor under an oil and gas lease) was a mere possibility of reverter. It has often been said that a possibility of reverter after a determinable fee cannot be assigned, as it is not an interest in land but a mere possibility of getting back an interest that has been granted to another, by the happening of the event that marks its limitation."

If the Texas court really means what it says when it lays down the proposition that an oil and gas lease effects a severance of the oil and gas from the surface estate and creates a new estate in the oil and gas as such, then it would seem to logically follow that happening of the event which terminates the lease, that such interest would revert to the lessor who created this determinable estate and not to his transferee of an entirely different estate, the surface estate. As pointed out by one writer on the subject, it is just as though the lessor owned a one hundred acre tract of land and conveyed fifty acres of it to A, creating in A a determinable fee. He thereafter conveys the remaining fifty acres to B. If A's estate is thereafter terminated by the happening of the event named in his deed, his estate should certainly revert to his grantor and not to B, the grantee of the other fifty acre tract.⁶⁹

In some of its holdings, the Texas court has seemed to lay stress upon the fact that the lessor after making an oil and gas lease, has conveyed the surface under a warranty deed and that his warranty estops him from later asserting any rights as to the unaccrued royalties under his lease or the mineral rights

⁶⁷ Gray, *Rule against Perpetuities* (3rd ed.) sec. 13.

⁶⁸ 254 S.W. 779 (Tex. Civ. App. 1923). See also *Humble Oil & Refining Co. v. Jeffrey*, 38 S.W. (2d) 374 (Tex. Civ. App. 1931).

⁶⁹ Walker, *Property Interests Created by Lease*, 7 Tex. L. Rev. 1, at 43 and 44.

in case of forfeiture of the lease where he has failed to reserve these rights to himself in the deed. In *Robinson v. Jacobs*⁷⁰ we find the court making the statement that the grantor owned the possibility of reverter qualifying the estate of the lessee under the lease and that his subsequent warranty deed of the land passed this interest, which inured to his benefit upon the abandonment of the contemplated mineral exploration and production, the same passed *eo instanti* to the warrantee. Now, in this case, too, it would seem that if the court is correct in its assertion that the lease created a separate and distinct estate in the oil and gas in place, the warranty in the deed conveying the land itself would have no effect upon the estate created in the oil and gas after there had been a severance.

ADEPTION UNDER A WILL

Another decision of seeming inconsistency on the part of the Texas court is found in *Frame v. Whitaker*⁷¹ where the owner of a tract of land made a will leaving a life estate in the same to his wife with power to sell. Thereafter the husband executed a lease granting the exclusive rights to the oil and gas in the same tract. After his death the widow filed suit claiming the royalties accruing before the husband's death and the right to have the lease canceled for a cause arising in the husband's lifetime. It was unsuccessfully contended that since the lease severed the oil and gas interest, thereby creating a separate estate in them, the lease adeemed the life estate and the widow took no interest in the tract as far as the oil and gas were concerned. If, as claimed by the court in other cases, the lease does create a separate estate in the oil and gas in place, it would seem that this contention of the defendants was sound. The court admitted that "if the testator disposed of the property or any part of it by deed or other instrument, there would be nothing for the will to take effect upon—the bequest would amount to nothing because there was no property that could be bequeathed." The court, however, failed to support this contention and held that the widow was entitled to the royalties accruing after the husband's death and could enforce a forfeiture for cause occurring there-

⁷⁰ 113 Tex. 231, 254 S.W. 309 (1923) and *Donnell v. Otts*, 230 S.W. 864 (Tex. Civ. App. 1921).

⁷¹ 7 S.W. (2d) 140 (Tex. Civ. App. 1928).

after. This holding is consistent with the view that an oil and gas lease creates a profit a prendre and not with the view that oil and gas may be owned in place and estates created therein apart from the ownership of the surface.

SUMMARY

The controversy as to the ownership of oil and gas in place has been of long standing. Some courts that at first approved it have turned to the other theory that an oil and gas lease at most creates a profit a prendre. The Texas court has been and is the most outspoken advocate of the ownership in place theory. We have seen, however, that on questions that really test the soundness of the theory, that court for the most part is in accord with the courts holding to the nonownership theory. It holds that the lessee under an oil and gas lease may abandon his rights under the lease although it is clearly the common law view that estates in land cannot be so abandoned.

When it comes to the lessee's right to maintain trespass or ejectment to protect his interest, we find that courts generally do not allow him these actions unless the lessee has entered into possession of the surface for the purpose of producing. This is consistent with the law as to profits a prendre where the profits a prendre are exclusive. The Texas cases uphold ejectment under a statutory enactment even where the lessee has not entered into possession under his lease.

In granting partition of the interest created by a lease of oil and gas, the court in Texas has in recent years acted under a statute expressly mentioning oil and gas leases but a review of the decisions does not show that as a practical matter such partition is often resorted to and that the provision for sale and division of the proceeds is more often the outcome of a suit for partition.

The decisions involving taxation questions have little or no bearing on the problem under consideration as taxation is a statutory matter and the fact that most statutes provide for taxing oil and gas rights as interests in land is not determinative as to the nature of those rights.

It is in the dealing with reversionary rights where there has been a lease of the oil and gas rights that we find the most

glaring discrepancy in the holdings of the Texas court. That court agrees with the general holding that where the lessor transfers his reversionary interest, that is the land on which he has given an oil and gas lease, and a forfeiture or abandonment under the lease occurs, the transferee of the land thereby acquires the oil and gas rights. Under the theory that a lease creates a profit a prendre, which is similar to an easement in effect, this result would be the correct one to reach. The holder of the freehold would have his land free of the encumbrance when the profit ceased to exist because of abandonment or forfeiture. The oil and gas interest would not go back to the lessor. This would not be so under a grant of a separate estate in the oil and gas rights. There the lessor would be in the position of being grantor of two estates, the oil and gas estate and the freehold interest in the land itself. There the reversion in one estate should not in any way concern or accrue to the grantee of the other estate.

Again in the case of the lessor's making a will devising the land under which there is oil and gas and later making a lease of such interests, if such lease creates an estate in these minerals apart from the land itself, then the making of such a lease should work an ademption of the devise. We have seen that the court in Texas has not so held but has held to the contrary.

The application of Lord Coke's dictum, *non quod dictum est, sed quod factum est inspicitur*⁷²—not what is said but what is done, is regarded—leads one to conclude that the Texas court does not really hold that there can be ownership of oil and gas in place.

⁷² Co. Lit. 36a.